BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of: Vermont Telephone Company's Petition for Declaratory Ruling Regarding Interconnection Rights.	WC Docket No. 08-56

COMMENTS OF THE CALIFORNIA PUBLIC UTILITIES COMMISSION AND THE PEOPLE OF THE STATE OF CALIFORNIA ON PETITION FOR DECLARATORY RULING

The California Public Utilities Commission and the People of the State of California (CPUC or California) respond here to the *Public Notice* released by the Federal Communications Commission (FCC or Commission) on April 18, 2008. In the *Public Notice*, the FCC seeks comments in response to a Petition for Declaratory Ruling filed by Vermont Telephone Company (VTel).[1] The CPUC offers these limited comments on the issues raised in VTel's petition; silence on any issue does not connote agreement.

I. BACKGROUND

VTel represents that it is a "family-owned" incumbent local exchange carrier (ILEC) "whose rural area covers 15 towns and villages in Southern Vermont,

[1] Petition of Vermont Telephone Company for Declaratory Ruling Whether Voice over internet Protocol Services Are Entitled to the Interconnection Rights of telecommunications Carriers, WC Docket No. 08-56, filed April 11, 2008 (Petition).

serving approximately 21,000 telephone lines".[2] On January 10, 2008, Comcast Phone of Vermont, LLC (Comcast) submitted to VTel a written request for interconnection pursuant to § 251(a)-(b) of the 1996 Federal Telecommunications Act (Telecom Act).[3] Specifically, Comcast requested an interconnection agreement that would include direct and indirect network interconnection, local number portability, reciprocal compensation via bill-and-keep, and access to directory listings and directory assistance.[4] Comcast also requested that VTel upgrade its switches in a number of areas to provide number portability in more than a dozen of VTel's rate centers.

Comcast holds a certificate from the Vermont Public Service Board, but does not purport to provide "telecommunications service". Rather, Comcast offers "Digital Voice" service, which is a Voice over Internet Protocol (VoIP) service,[5] and it was for the "Digital Voice" service that Comcast requested an interconnection agreement pursuant to § 251.

In its petition, VTel cites to various provisions of the 1996 Federal Telecommunications Act (Telecom Act), specifically §§ 251 and 252, and notes that those sections impose obligations on ILECs and LECs pertaining to competitors seeking interconnection. Section 251(a) creates a "general duty of telecommunications carriers" and explicitly states as follows:

> Each telecommunications carrier has the duty -

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[2] *Id.* at 1.

[3] 47 U.S.C. 251(a) to 251(b).

[4] *Id.* at 2.

[5] *Id.*

> (1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers[.]

Section 251(c) imposes "additional obligations of incumbent local exchange carriers", and specifically § 251(c)(2) sets forth the following requirement:

> Interconnection – The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network[.]

The subsections, 251(c)(2)(A) through (D) list further requirements pertaining to interconnection. In addition, VTel cites to § 252 of the Telecom Act, which sets forth a process for ILECs to negotiate an interconnection agreement pursuant to an interconnection request under § 251.[6] Finally, VTel cites to § 251(b) which refers to the provision of "telephone exchange service and telephone toll service".[7]

Having flagged these particular provisions of the Telecom Act, VTel poses the following questions for the FCC:

1. Whether or not only "telecommunications carriers" are entitled to interconnection with LEC facilities by the express terms of §§ 251 and 251 of the Telecom Act;

2. Whether or not VoIP providers are entitled to interconnection pursuant to those sections of the Telecom Act when they assert they are not "telecommunications carriers";

3. Whether or not Comcast is a telecommunications carrier and, therefore, entitled to interconnection pursuant to the cited statutory provisions.[8]

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[6] *Id.* at 1, 2, 3.

[7] *Id.* at 4; *see* 47 U.S.C. 251(b)(3).

[8] *Id.* at 1, 8.

For reasons set forth below, California believes that the FCC needs to answer these questions. We recognize, however, that this docket, because it concerns a request for declaratory relief which by definition is limited to the facts presented, may not be the best venue for the Commission to set forth a far-reaching policy.

II. THE FCC MUST ADDRESS THE STATUS OF VoIP PROVIDERS UNDER THE RUBRIC OF THE TELECOM ACT

In essence, VTel is asking the following overarching question: whether VoIP providers have the right to interconnect pursuant to §§ 251 and 252, and if so, what rights and obligations, if any, do those providers have pursuant to the statutory regime set forth in the Telecom Act.

The CPUC firmly agrees that the FCC should resolve this overarching question. The question is not a new one; indeed, it has been pending for several years before the FCC in the *IP-Enabled Services* docket.[9] Further, California recognizes that interconnection of carriers using new technologies offers the opportunity for increasing competition, especially in rural areas where traditional wireline networks have not been deployed or have been under-deployed. At the same time, the VTel petition underscores the very obvious dilemma that may arise when an entity obtains one or more interconnection agreements affording it the opportunity to provide telecommunications service while not being subject to any of the obligations attendant to offering a "telecommunications service".

[9] *In the Matter of IP-Enabled Services, NPRM*, WC Docket No. 04-36, rel. March 10, 2004.

Like VTel, California does not take a position here on how the FCC should answer the overarching question that VTel's petition poses. And, the CPUC notes that the questions implicated by the VTel petition are broader than those relating to interconnection and, ideally, should be decided in a commensurately broader docket or proceeding, such as the *IP-Enabled Services* docket. Nonetheless, the FCC should resolve the issues presented sooner rather than later. While VoIP was a nascent technology when the Telecom Act was enacted, that is no longer the case; clarity regarding these issues is now not only desirable but necessary.

California has found itself litigating, in both federal and state courts, against a company, Global NAPs California, Inc., which alleges that it is providing "VoIP" service(s), and therefore, is exempt from state regulation – notwithstanding the fact that the traffic it carries, by its own admission, terminates on the Public Switched Telephone Network (PSTN).[10] One argument advanced is that the VoIP traffic in question "originates on the internet", and therefore is traffic which, by the litigant's definition, exempts it from state oversight. Global NAPs relied heavily on the FCC's *Vonage* decision as well as its earlier holding in the *IP-Enabled Services* docket.[11] The CPUC successfully countered those arguments, relying on various

[10] *See* Case No. CV-07-4801, United States District Court for the Central District of California. Global NAPs also appealed unsuccessfully to the California Court of Appeal and the California Supreme Court. The CPUC suspended Global NAPs' certificate of public convenience and necessity because Global NAPs refused to comply with two CPUC orders directing Global NAPs to remit unpaid monies to Cox Communications for services rendered. Global NAPs appealed the suspension to both the U.S. District Court and California appellate courts.

[11] *In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, *Memorandum Opinion and Order*, WC Docket No. 03-211, FCC 04-267, rel. November 12, 2004.

Circuit Court of Appeals' decisions which have upheld the states' right to adjudicate disputes arising from § 251 interconnection agreements.

The Global NAPs cases demonstrate that the FCC has left some important questions unanswered, giving carriers the opportunity to argue different theories at different times, thus creating a regulatory void where neither the FCC nor states oversee their actions. In the California litigation, Global NAPs was able to obtain interconnection agreements after receiving a California Certificate of Public Convenience and Necessity (CPCN), only to argue later that it did not owe compensation to other carriers because the traffic in question was "VoIP" in nature, and thus not subject to the interconnection agreement and to state oversight. The FCC should not allow carriers to take advantage of the lack of clarity in FCC policies to advance their own interpretations. Further delay by the FCC in addressing these issues will result in the CPUC and other parties expending many more hours litigating questions related to the very matters VTel has raised in its petition.[12]

III. CONCLUSION

For the reasons stated, the CPUC urges the FCC to address the question(s) raised in the VTel petition, if not here, then soon and in a broader context.

[12] The CPUC notes also that the 9th Circuit Court of Appeals issued on April 30, 2008 an Opinion concerning an appeal from the U.S. District Court for the Central District of California. The case involved a complaint for damages by a plaintiff who alleged that she was "slammed" by a VoIP provider, Time Warner, in violation of 47 U.S.C.258(a). The Court dismissed the complaint without prejudice, determining that "primary jurisdiction" to determine whether § 258(a) applied to the facts presented rested with the FCC, not the federal courts. While not directly relevant to the VTel petition, California notes that the 9th Circuit case raises one more issue involving the regulatory treatment of VoIP yet unresolved by the FCC.

Respectfully submitted,

LIONEL B. WILSON
HELEN M. MICKIEWICZ

By: /s/ HELEN M. MICKIEWICZ

HELEN M. MICKIEWICZ

505 Van Ness Avenue
San Francisco, CA 94102
Phone: (415) 703-1319
Fax: (415) 703-4592

Attorneys for the California Public Utilities Commission and the People of the State of California

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